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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THE FLORIDA BAR

Petitioner,

v.

G. STEWART MCHENRY;
WENT FOR IT INC.; AND
JOHN T. BLAKLEY,

Respondents.

On Writ Of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Amicus Curiae Brief of the Dade County Trial Lawyers Association and The American Board of Trial Advocates In Support of the Petitioner's Brief on the Merits

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. THE 30 DAY WAITING PERIOD SET FORTH IN RULE 4-7.4 CONSTITUTES A REASONABLE RESTRICTION LIMITED TO THE TIMING OF DIRECT MAIL SOLICITATION WHICH IS SUPPORTED BY A SUBSTANTIAL STATE INTEREST 5

CONCLUSION 17

TABLE OF AUTHORITIES

Cases — Page

Bates v. State of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) 2, 3, 4, 5, 7

Central Hudson Gas v. Pub. Serv. Comm'n, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) 16

Edenfield v. Fane, _U.S._, 113 S. Ct. 1792, 123 L.Ed. 2d 543 (1993) 14

Friedman v. Rogers, 440 U.S.1. 99 S. Ct. 887, 59 L.Ed.2d 100 (1979) 15

Goldfarb v. Virginia State Bar, *421 U.S. 775, 792, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975)* 7, 14

In re R.M.J., 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed.2d 64 (1982) 15

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988) 6, 15

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d. (1985) .. 4, 15

Other Authorities

Peltz, *Legal Advertising - - Opening Pandora's Box, 19 Stetson L.Rev. 43 (1989)* 8, 9, 14

Rule 4-1.6(b), Rules Regulating The Florida Bar 7

Rule 4-3.1, Rules Regulating The Florida Bar 7

Rule 4-3.3, Rules Regulating The Florida Bar 7

Rule 4-3.4, Rules Regulating The Florida Bar 7

Rule 4-7.4, Rules Regulating The Florida Bar 2, 17

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AMICUS CURIAE BRIEF OF THE DADE COUNTY TRIAL LAWYERS ASSOCIATION AND THE AMERICAN BOARD OF TRIAL ADVOCATES IN SUPPORT OF THE FLORIDA BAR'S BRIEF ON THE MERITS

STATEMENT OF INTEREST

The Dade County Trial Lawyers Association (DCTLA) is a voluntary organization of over 400 attorneys, who specialize in plaintiffs' personal injury trial practice in Dade County, Florida.

The American Board of Trial Advocates(ABOTA) is a national organization whose members include 4,200

trial lawyers, judges, and other public officials. ABOTA's members are vitally concerned with the preservation and improvement of the present civil justice system in the United States. A major purpose of the organization is to promote the fair and efficient administration of justice for the benefit of individual litigants and the general public.

In representing the group of individuals, who would be most affected by the subject advertising regulation, the DCTLA and ABOTA file this Amicus Curiae brief with the consent of the parties, in support of the Florida Bar's position and urge this Court to reverse the Circuit Court's opinion striking down the 30 day waiting period set forth in Rule 4-7.4 of the Rules Regulating the Florida Bar. As indicated herein, both the DCTLA and ABOTA believe that there is an urgent need for this regulation and that it clearly falls within the constitutional parameters set forth by this Court in its prior decisions.

SUMMARY OF ARGUMENT

Although expressing its deep concern over many of the problems created by attorney advertising following this Court's decision in *Bates*, the Eleventh Circuit concluded that it was bound by the *Bates* line of cases to strike Florida's 30 day waiting period for direct mail solicitation. Even though it found "the Florida Bar's attempt to regulate such intrusions entirely understandable," the Eleventh Circuit concluded that the *Bates* line of cases require states to rely upon voluntary self restraint in this area.

Contrary to the Eleventh Circuit's plea for such voluntary self-restraint, experience has shown that such pleas are generally ignored, giving rise to the need for

mandatory action by state licensing authorities. Perhaps even more importantly, however, the Circuit Court's opinion misreads this Court's prior decisions, which do not prevent states from regulating attorney advertising, so long as there is sufficient evidence in the record supporting the need for such regulations to protect a substantial state interest and the regulation is narrowly tailored to remedy the particular abuses involved.

In fashioning its advertising rules, Florida heeded the lessons of *Bates*. Rather than attempting to justify over- broad restrictions on advertising by relying upon nebulous concepts of professional dignity, The Florida Bar instead undertook a detailed and comprehensive two year study of attorney advertising, which identified particular problems that needed to be addressed and then carefully crafted its regulations to remedy the specific problems identified as a result of its study.

In the process, the Florida Bar developed a strong empirical record, which included numerous scientifically conducted surveys, polls and studies, that not only clearly identified particular advertising problems, but which also provides objective evidence supporting the need for Florida's specific advertising restrictions, including the one involved in the subject case.

In addition to the numerous Florida surveys and studies available to the Bar, it also looked to a number of similar surveys performed in other states, particularly Iowa and Nevada, which reached similar results and conclusions. During its study, the Florida Bar was also faced with considerable anecdotal evidence of the damage caused by direct mail solicitation following several tragic mass disasters which occurred

in the state during this time period.

The comprehensive and well documented efforts of the Florida Bar to first identify and then remedy specific advertising abuses stands in stark contrast to the total lack of effort found in many of the other cases in which this Court has stricken advertising restrictions.

This Court has previously recognized that the interest of states in regulating attorneys is especially great, because of their essential role in the primary government function of administering justice. Likewise, this Court has also made it clear that while truthful advertising related to lawful activities is entitled to constitutional protection, that states may impose appropriate restrictions where experience has proved that in fact a particular method of advertising has been subject to abuse.

In considering the appropriateness of such restrictions, this Court has distinguished between outright advertising prohibitions as in *Bates* and mere regulations in the manner and mode of presentation as in the present case. In many ways, the Florida Rule in question is even less intrusive than the disclosure regulations allowed in *Zauderer*, since it does not effect in any manner the content of the advertising, merely its timing.

Regardless of which standard the Court finds applicable, the strong empirical record developed by the Florida Bar is clearly sufficient under the prior decisions of this Court to uphold the constitionality of the subject regulation.

ARGUMENT

I.

THE 30 DAY WAITING PERIOD SET FORTH IN RULE 4-7.4. CONSTITUTES A REASONABLE RESTRICTION LIMITED TO THE TIMING OF DIRECT MAIL SOLICITATION WHICH IS SUPPORTED BY A SUBSTANTIAL STATE INTEREST

Although the Eleventh Circuit struck Florida's 30 day waiting period for direct mail solicitation, the Court clearly recognized the compelling need for this regulation. While the Circuit Court noted that it felt constrained to take this action in light of this Court's prior decision in *Bates v. State of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), it unmistakenly expressed its reluctance to follow down this path by going on to observe:

> Justice Powell predicted in *Bates* that recognizing First Amendment protections for attorney advertising would "effect profound changes in the practice of law, viewed for centuries as a learned profession." [Citations omitted.] That prediction has proven true. Unfortunately, the resulting changes have not necessarily been for the better. We are disturbed that *Bates* and its progeny require the decision we reach today. We are forced to recognize that there are members of our profession who would mail solicitation letters to persons in grief, and we find The Florida Bar's attempt to regulate such intrusions entirely

> understandable. Although the Bar may not formally restrict such behavior, an attorney's conscience, self-respect, and respect for the profession should dictate self-restraint in this area. To preserve the law as a learned profession demands as much.

McHenry v. The Florida Bar, 21 F.3d 1038, 1045 (11th Cir. 1994) (emphasis added).

Contrary to the Eleventh Circuit's well intentioned plea for voluntary self-restraint in this area, experience has shown that such pleas are generally ignored giving rise to the need for mandatory action by state licensing authorities. As pointed out by Justice O'Connor in her dissent in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 490, 108 S.Ct. 1916, 100 L.Ed 2d 475 (1988):

> [i]mbuing the legal profession with the necessary ethical standards is a task that involves a constant struggle with the relentless natural force of economic self-interest. It cannot be accomplished directly by legal rules, and it certainly will not succeed if sermonizing is the strongest tool that may be employed. Tradition and experiment have suggested a number of formal and informal mechanisms, none of which is adequate by itself and many of which may serve to reduce competition (in the narrow economic sense) among members of the profession.
>
> ...Restrictions on advertising and solicitation by lawyers properly and significantly serve the same goal. Such restrictions act as a concrete, day-to-day reminder to the practicing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other.

> ...[T]his Court's recent decisions reflect a myopic belief that "consumers," and thus our nation, will benefit from a constitutional theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundations. (emphasis added).

Perhaps even more importantly, however, the Circuit Court's opinion fails to grasp the essential difference between the legal profession and other "learned" ones. Unlike other professions, attorneys form an indispensable and integral component in the functioning of the judicial system, which is the core of our democracy. Thus, attorneys do more than just represent clients--they are "officers of the court" in all senses of the title. *E.g. Goldfarb v. Virginia State Bar*, 421 U.S. 775, 792, 95 S.Ct. 2004, 44 L.Ed. 2d 572(1975). As such, they carry legal and ethical obligations, which often exceed their own interests and at times, even transcend the interests of their clients. See Rules 4-1.6(b), 4-3.1, 4-3.3 and 4-3.4, Rules Regulating the Florida Bar. Therefore, when citizens lose confidence in attorneys as a profession, more than just attorneys' "dignity" is involved. As the empirical evidence developed by the Florida Bar clearly shows, this public loss of confidence in the legal profession translates into a direct loss of confidence in the fair and impartial functioning of our judicial system itself.

In fashioning its advertising rules, Florida heeded the lessons of *Bates* and its progeny. Rather than attempting to justify over broad restrictions on advertising by relying upon nebulous concepts of professional dignity, like the State of Arizona in *Bates*, the Florida Bar instead undertook a detailed and comprehensive two year study of attorney advertising, which identified particular problems that needed to be addressed and then carefully crafted its regulations to remedy the specific problems identified as a result of its

study. In the process, the Florida Bar developed a strong empirical record, which included numerous scientifically conducted surveys, polls and studies, that not only clearly identified particular advertising problems, but which also provides objective evidence supporting the need for Florida's specific advertising restrictions, including the one involved in the subject case, in order to combat the specific problems identified.[1]

One of the earliest scientific studies relied upon by the Florida Bar was a 1987 survey entitled "Attitudes & Opinions of Florida Adults Toward Direct Mail Advertising by Attorneys," conducted by Frank N. Magid Associates. This study contained both a survey of the attitudes of the general population toward direct mail solicitation and a second component limited to actual recipients of direct mail solicitations. Of this latter group, 80% indicated that they did not believe that the advertisement was totally truthful, while 45% found that they were designed to appeal to gullible or unstable people. A majority expressed the further opinion that direct mail advertising promoted unwarranted and frivolous law suits, which in turn produced higher legal costs for everyone.

Most ominously, however, 27% of those surveyed said that their regard for the legal profession and the judicial process had been adversely affected by their receipt of direct mail solicitations. Even more importantly, however, 11% of the respondents admitted that direct mail advertising produced such concerns about the honesty of the legal profession that it could

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[1] These studies and surveys are discussed in more detail in Peltz, *Legal Advertising - - Opening Pandora's Box*, 19 Stetson L.Rev. 43 (1989).

A summary of these surveys and studies, which accompanied the Florida Bar's proposed rules to the Florida Supreme Court, was also introduced in the trial Court below.

importantly, however, 11% of the respondents admitted that direct mail advertising produced such concerns about the honesty of the legal profession that it could influence the way they would feel about lawyers or litigants, if they were to serve as jurors in a civil trial. Since most people are unwilling to express the highly unpopular and undesirable opinion that they could ever be biased jurors, the survey concluded that the number of people actually holding this opinion was therefore undoubtedly much higher.

Thus, the study concluded that not only did direct mail solicitation generally create negative feelings toward the soliciting attorney, but even more importantly that such solicitation creates significant negative feelings in the general public toward both the legal system as a whole and the entire judicial process. The significance of these findings is that the damage caused by direct mail solicitation is not limited to merely impugning the dignity of the profession, but carries over to the functioning of the jury system and the general public's confidence in the entire judicial system. *See* Peltz, *supra* note 1, at 116-17.

Another Florida study relied upon by the Florida Bar, but commissioned by the Academy of Florida Trial Lawyers, the statewide plaintiff's trial bar, reached remarkably similar results. In Kitchens & Associates, "Lawyer Advertising Polling Survey (1988)," 64% of the general public polled statewide expressed a favorable impression of attorneys in general, compared to 27% unfavorable and 10% undecided. On the other hand, 69% of the public held an unfavorable view of lawyers who advertise compared to 23% favorable and 8% undecided. More importantly, however, the survey also found that this high negative rating for television advertisers affects the remainder of the legal profession, since "it makes all lawyers appear to be unethical..." and thereby undermines their role in the administration of our justice system.

Accordingly, the survey concluded:

> As the following data clearly indicates the legal profession has been damaged by the advertising of legal services. While advertising may be an effective marketing tool for some law firms, the communication is creating a negative image for all lawyers...
>
> One persuasive impact of lawyer advertising is to lower the credibility of lawyers. The source of the credibility problem is not competency, but a lack of an empathy, ie: not representing the best interests of the client. They believe lawyers who advertise... are more interested in money than in the problems of the client. Thus the perceived intentions of lawyers are questioned and the resulting image is a self-serving one similar to that of used car salesmen--someone out to make money by taking advantage of others.

Kitchens & Associates, *Lawyer Advertising Polling Survey* (1988), 3, 6-7.

Further empirical evidence was provided by the "Florida Circuit Judges Questionnaire," which was a 1988 survey of 261 state trial judges. This survey is particularly telling, since the trial judges who made up the pool have perhaps the best vantage point to observe the effects of attorney advertising on the administration of justice from a first hand basis, due to their opportunity to actually sit through voir dire and all of the other aspects of hundreds of trials each year. Over 78% of these trial judges responded by noting that attorney advertising negatively impacted upon the public confidence in the administration of justice. Twenty-three percent of the judges recounted jurors,

witnesses or parties expressing an opinion concerning attorney advertising during some part of a trial that they had presided over.

The Bar also utilized a second study commissioned by the Academy of Florida Trial Lawyers, entitled "Civil Jury Study (1989)." Although this six month study was designed to understand and mitigate the effects of anti-lawyer propaganda, it necessarily examined the effects of attorney advertising on the general public as part of its analysis. This survey echoed the same results as the others, in that 68% of those surveyed complained that much of the negative feeling directed to the legal profession was the belief that individuals are encouraged to bring more law suits than they should, which in turn has caused a rise in insurance rates for everyone else.

These feelings were further explored through various focus groups conducted in Miami and Orlando, involving potential jurors. Among the conclusions reached as part of this portion of the study was that the public equates attorney advertising with responsibility for causing many unfounded, superfluous and frivolous law suits:

> "Lawyer advertising contributes mightily to their negative image. The advertising is self promoting, ambulance chasing, debasing, and unprofessional."

AFTL, *Civil Jury Study (1989), 2.*

Other similar empirical data was generated by three additional Florida surveys entitled "Media Pre-Test and Post Test Surveys," "A Study of Florida Bar Public Service Announcements" and "Television Advertising by Attorney's and an Evaluation of its Impact on the Public." This latter study also included a survey of proposed bar rules and concluded that

> there was consistent support for each element of the proposed rules. . .evidenced by a high majority of respondents. . . These findings indicate a strong pattern of popular support for the proposed regulations. Each proposed rule had a demonstrable impact in remedying respondent reactions to advertising elements they found objectionable.

Moore, *Television Advertising by Attorneys: An Evaluation of its Impact on the Public (1989), 28.*

Despite the breath and comprehensive nature of the various Florida surveys and studies available to the Bar, its research was not limited by the borders of this state. The Bar also looked to a number of surveys performed in Iowa, which had subsequently adopted even more restrictive advertising guidelines. These studies included a pair of surveys by Frank N. Magid Associates, entitled "Attitudes and Opinions Toward Advertising for Law Firms" and "Consumer Attitudes Toward Yellow Pages Legal Advertising," which reached similar conclusions to the numerous Florida studies.

Additional empirical data was also provided by a Nevada study entitled "Attorney Advertising: The Effect on Juror Perceptions and Verdicts." In this survey, 63% expressed negative opinions toward television advertising, while only 39% felt that such advertising helped to inform people of their legal rights or to assist them in choosing an attorney. Even more remarkable, however, was the finding that 83% of the respondents favored the defense in cases where the Plaintiff was represented by an advertiser, compared to only 40%, where the Plaintiff was represented by a non-advertiser. None of the potential explanations for this tremendous discrepancy does much to advance the cause of attorney advertising.

During its study, the Florida Bar also was faced with considerable anecdotal evidence of the havoc to the public's already weakened perception of the legal profession caused by direct mail solicitation following several tragic mass disasters in the state. Direct mail solicitation in these cases unleashed an avalanche of highly critical editorials and news articles across Florida. Virtually every major newspaper in the state complained that accident victims, bereaved spouses and parents, and other victims of misfortune were being inundated with letters from Florida attorneys, while local police departments were being paralyzed by lawyers' demands for copies of accident reports.

Some statewide newspaper headlines appearing during the course of the Bar study period included:

> "Scavenger Lawyers" (Miami Herald, September 29, 1987).
>
> "Law Firm Sends Wreath After Baby's Death" (Pensacola News-Journal, July 17, 1987).
>
> "Take Action on Ghoulish Attorneys" (Fort Lauderdale Sun Sentinel, September 16, 1987.)
>
> "Ambulance Chasing Lawyers Have No Place in Profession"
> (The Florida Times-Union, September 28, 1987.)
>
> "Soliciting by Lawyers Drawing Criticism" (St. Petersburg Times, September 26, 1987).
>
> "Chasing Ambulances-Solicitations Give Lawyers a Black Eye" (Bradenton Herald July 15, 1987).

> "Bus Crash Survivors Hounded by Lawyers" (Fort Lauderdale Sun Sentinel, September 16, 1987).

Peltz, *supra* note 1, at 116. These represent only the briefest sampling of the overwhelming deluge of articles and columns recounting numerous horror stories of direct mail solicitation following tragedies during the period preceding the adoption of Florida's present advertising rules.

The comprehensive and well documented efforts of the Florida Bar to first identify and then remedy specific advertising abuses stands in stark contrast to the total lack of effort demonstrated by the Florida Board of Accountancy in *Edenfield v. Fane*, _ U.S. _, 113 S.Ct. 1792, 123 L.Ed. 2d 543 (1993). As observed by this Court in *Edenfield*, the accounting board offered no "empirical data," "studies," or even "any anecdotal evidence, either from Florida or another state that validates the Board's suppositions." Id. at 1800. Instead, the Board relied exclusively upon the affidavit of one of its former chairmen, "which contained nothing more than a series of conclusory statements. . ." Id. at 1801.

Thus, the attempt to regulate the solicitation involved in *Edenfield* failed because of the total absence of any evidentiary record to support the existence of a causal relationship between the subject regulation and the state interest it was intended to remedy and not because of the lack of a substantial state interest. Clearly such an evidentiary record exists in the present case.

Because of their essential role in "the primary government function of administrating justice," this Court has previously recognized that "[t]he interest of the States in regulating lawyers is especially great. . ." *Goldfarb*, 421 U.S. 792. As a result,

> . . . special ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours.

Shapero, 486 U.S. 489 (O'Connor, J., dissenting).

This Court summarized its prior attorney advertising decisions in *In re R.M.J*, 455 U.S. 191, 203, 102 S.Ct. 929, 71 L.Ed 2d 64 (1982), by holding that while truthful advertising related to lawful activities is entitled to constitutional protection,

> . . . when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. (emphasis added).

Also see *Friedman v. Rogers*, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed. 2d 100 (1979).

In considering the "appropriateness" of such restrictions, this Court has also distinguished between outright advertising prohibitions as in *Bates* and mere regulations on the manner and mode of presentation as in the present case. For example, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, n.14, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), this Court rejected the contention that mandatory disclaimers and disclosures of additional information must necessarily be judged by the same constitutional standards used to determine whether the advertisement could be regulated in the first instance. Since these disclaimers and disclosures did not constitute an outright ban of the advertising involved, this Court instead required only that they be

"reasonably related" to the state's legitimate interest in preventing the deception of its citizens.

In many ways, the Florida rule in question is even less intrusive than the disclosure regulations involved in *Zauderer*, since it does not effect in any manner the content of the advertising, merely its timing. Accordingly, a strong argument can be made that the Florida Bar need only show a "reasonable relationship" between the subject rule and any legitimate state interest. Nevertheless, the strong empirical record developed by the Florida Bar in promulgating its proposed rules is clearly sufficient under the prior decisions of this Court to easily meet the even stricter standard applied in *Central Hudson Gas v. Public Service Comm.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1980).

CONCLUSION

The Dade County Trial Lawyers Association and The American Board of Trial Advocates respectfully urge this Court to reverse the decision below and declare Rule 4-7.4(b) of the Rules Regulating the Florida Bar valid. The DCTLA and ABOTA further join the additional request of the Florida Bar urging this Court to revisit the *Bates* premise and broaden the discretion of the States in the regulation of attorney advertising.

Respectfully submitted,

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